INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional provisions and statutes involved	3
Statement	5
Specification of errors to be urged	6
Summary of argument	7
Argument	
Since the essence of the offense here is the failure to make a required report, venue is properly fixed at the place where the report is required to be made	9
Conclusion	26

CITATIONS

Cases:

Armour Packing Co. v. *United States*, 209 U. S. 56	7, 9
Blossom v. *Griffin*, 13 N. Y. 569	14-15
Bowles v. *United States*, 73 F. 2d 772, certiorari denied, 294 U. S. 710	13
Bratton v. *United States*, 73 F. 2d 795	10, 13
Burton v. *United States*, 202 U. S. 344	8, 25
Christenson v. *American Express Co.*, 15 Minn. 270	14
Colfax Fruit Co. v. *So. Pac. Co.*, 118 Cal. 648	7, 14
Consumer Mail Order Ass'n v. *McGrath*, 94 F. Supp. 705, affirmed, 340 U. S. 925	21
Davis v. *Jacksonville Southeastern Line*, 126 Mo. 69	14
Eisler v. *United States*, 176 F. 2d 21, certiorari denied, 337 U. S. 958	12
Fuller v. *United States*, 110 F. 2d 815	12
Johnson v. *State*, 66 Ill. App. 103	11
Horner v. *United States*, *No. 1*, 143 U. S. 207	25
McBoyle v. *United States*, 43 F. 2d 273, reversed, 283 U. S. 25	25
New York Central and H. R. R. Co. v. *United States*, 166 Fed. 267	13
Palliser, In re, 136 U. S. 257	8, 25
People v. *Meyer*, 12 Misc. 613	11
People v. *Quigley*, 75 Misc. 151	11

Page

Rumely v. *McCarthy*, 250 U. S. 283 ..... 7, 10, 13
Salinger v. *Loisel*, 265 U. S. 224 ..... 7, 9, 25
St. L., K. C. & N. Rly. Co. v. *Piper*, 13 Kan. 505 14
State v. *Brewster*, 87 N. J. L. 75 10-11
State v. *Peabody*, 25 R. I. 544 11
State v. *Yocum*, 182 Ind. 478 11
United States v. *Anderson*, 328 U. S. 699 2
United States v. *Commerford*, 64 F. 2d 28, certiorari denied, 289 U. S. 759 ..... 7, 10, 13
United States v. *Freeman*, 239 U. S. 117 15
United States v. *Johnson*, 323 U. S. 273 ..... 8, 21, 22, 26
United States v. *Lombardo*, 241 U. S. 73 ..... 7, 10, 12
United States v. *Midstate Horticultural Co.*, 306 U. S. 161 23
Wampler, United States ex rel. v. *Hill*, 74 F. 2d 940, certiorari denied, 295 U. S. 732 12
Wampler v. *Snyder*, 66 F. 2d 195 12

CONSTITUTIONAL PROVISIONS AND STATUTES:

Constitution:

Article 3, Section 2, Clause 3 ..... 3, 7, 9
Sixth Amendment 3, 7, 9
Public Law 363, 81st Cong., 1st sess., 63 Stat. 844, 15 U. S. C., Supp. V, 375 3
Sec. 1 3
Sec. 2 ..... 4, 10
Sec. 3 ..... 5, 10
18 U. S. C. 876 16
18 U. S. C. 1341 ..... 9, 16
18 U. S. C. 3237 ..... 9, 21
18 U. S. C. 3239 16

MISCELLANEOUS:

American Law Institute, *Restatement of the Law of Conflict of Laws*, § 428 12
Beale, *Conflict of Laws* (1935), Vol. II, p. 1287 11
94 Cong. Rec. 6708, 6719 20
6710-6711 20
6715 20
6718 20
6719 ..... 20, 21
6720 20
6724 20
6726 20
6727 ..... 20, 25
6729 20

Page

95 Cong. Rec. 1321, 1572, 2215, 2556, 2745, 3148, 3636 19
6350 19
6353, 6358, 6361-6365, 14017 20
6355 20
6360 19
6363, 14017 19
13306, 14015 19
14017 18
14019 19
H. R. 5645, 80th Cong., 2d sess. 20
H. Rep. 416, 81st Cong., 1st sess., pp. 1, 2, 3 ..... 17, 25
Reviser's Note to 18 U. S. C. 3237 22
S. Rep. 644, 81st Cong., 1st sess., pp. 1, 2 ..... 18, 25
Webster's *New International Dictionary* (2d ed.) 14

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 197

UNITED STATES OF AMERICA, *Appellant*

v.

JOSEPH H. WILSON, Doing Business Under the Trade Name and Style of "COOPERATIVE BUYING SERVICE"

No. 198

UNITED STATES OF AMERICA, *Appellant*

v.

PURCHASING CORPORATION OF AMERICA, NORMAN W. RAIES, WILLIAM T. TWEEL and MARY LOUISE HADDAD

On Appeals from the United States District Court for the Eastern District of Louisiana

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The oral opinion of the District Court (197R. 6; 198R. 4) is not reported.[1]

---

[1] Except for the factual allegations in the indictments and the pagination, the records in these two cases are identical. References to the record in No. 197 will be in the form of 197R; those to No. 198 will be 198R.

JURISDICTION

The minute orders of the District Court dismissing the indictments were entered May 20, 1952 (197R. 5; 198R. 4). The United States filed its notices of appeal to this Court on June 17, 1952 (197R. 7; 198R. 6). Probable jurisdiction was noted by this Court on October 13, 1952 (197R. 9; 198R. 7). The jurisdiction of this Court to review on direct appeal an order of the District Court dismissing an indictment, where such a dismissal is based on a construction of the statute on which the indictment is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. and see *United States* v. *Anderson*, 328 U. S. 699.

QUESTION PRESENTED

The Tobacco Tax Act makes it an offense for anyone who has shipped cigarettes in interstate commerce to persons other than distributors in a state taxing the sale or use of cigarettes to fail to forward to the tobacco tax administrator of the state to which shipment was made a memorandum or copy of the invoice covering each shipment. The question presented is whether venue of the offense of failure to forward to the proper official the required reports lies in the district where such official is located.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, Section 2, Clause 3 of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; * * * .

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *.

Public Law 363, 81st Cong., 1st sess., 63 Stat. 884, 15 U.S.C., Supp. V, 375, *et seq.*, commonly known as the Tobacco Tax Act or the Jenkins Act, provides as follows:

> To assist States in collecting sales and use taxes on cigarettes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That as used in this Act the term—
>
> (a) "person" means any individual, partnership, corporation, or association;

(b) "disposing of" means any transfer for profit;

(c) "cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco;

(d) "licensed distributor" means any person authorized by State statute or regulation to distribute cigarettes at wholesale or retail;

(e) "use," in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes;

(f) "tobacco tax administrator" means the State official duly authorized to administer the cigarette tax law of a State.

Sec. 2. Any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes shall, not later than the 10th day of each month, forward to the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every such shipment of cigarettes made during the previous calendar month into said

State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

Sec. 3. Whoever violates the provisions of this Act shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than six months, or both.

STATEMENT

Two separate indictments charging violations of the Tobacco Tax Act were returned in the United States District Court for the Eastern District of Louisiana against (1) Joseph H. Wilson, doing business as Cooperative Buying Service, and (2) Purchasing Corporation of America, a Virginia corporation, and its individual officers. The indictment against Wilson (197R. 1-4) was in five counts, charging that Wilson, having shipped cigarettes in five separate months from North Carolina to non-distributors in Louisiana, failed to forward to the Collector of Internal Revenue for Louisiana the required memoranda or copy of invoices. The indictment against the corporation and its officials (198R. 1-3) charged that the defendants, having shipped cigarettes from North Carolina and West Virginia to non-distributors in Louisiana, failed to forward to the Louisiana Collector the required memorandum or copy of invoices.

Each of the defendants moved to dismiss the indictments for lack of jurisdiction, on the ground

that the offenses charged had not been committed within the jurisdiction of the District Court for the Eastern District of Louisiana (197R. 5; 198R. 3). The two cases were consolidated for argument, and the District Court dismissed both indictments for lack of jurisdiction (197R. 5; 198R. 4).

The District Court stated that the duty imposed by the Tobacco Tax Act, to forward to the appropriate state official the required records of shipment, was a duty to be performed "at the place from which the cigarettes were shipped" and that it was not the equivalent of a duty to file such records with the appropriate official. Accordingly, it held that the failure to forward to the state official the necessary reports occurred in the district from which the shipment was sent, rather than in the district of the office to which the reports were to be forwarded (197R. 6; 198R. 4-5).

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the forwarding of a report to the appropriate state official, as and when required by the Act, "is required to be done at the place from which the cigarettes were shipped," and in holding, accordingly, that venue of the offense of failure to "forward to the Tobacco Tax Administrator" the memorandum or copy does not lie in the district of the place to which such memorandum or copy is to be forwarded.

2. The District Court erred in dismissing the indictments.

SUMMARY OF ARGUMENT

The Constitution requires that an accused person shall be tried in the state where his offense has been committed (Constitution, Article III, Section 2, Clause 3; Sixth Amendment). Venue, therefore, depends upon the nature of the crime as established by Congress (*Armour Packing Co.* v. *United States,* 209 U. S. 56; *Salinger* v. *Loisel,* 265 U. S. 224). In the case of an offense of omission, the crime is deemed to have occurred where the required act should have been performed (*United States* v. *Lombardo,* 241 U. S. 73).

With respect to failure to file reports, the cases have consistently held that venue is properly fixed in the state where the office of the official who is designated to receive the reports is located (*United States* v. *Lombardo,* 241 U. S. 73; *Rumely* v. *McCarthy,* 250 U. S. 283; *United States* v. *Commerford,* 64 F. 2d 28 (C. A. 2), certiorari denied, 289 U. S. 759). The fact that Congress, in the statute under consideration, used the language "forward to," rather than "file with" or "make a report to," indicates no change in substance. The words "forward to" have been judicially construed to mean to carry to the destination, rather than to send along the way. *Colfax Fruit Co.* v. *Southern Pacific Co.,* 118 Cal. 648. Moreover, the legislative history of the Tobacco Tax Act makes

it clear that Congress used the words as the equivalent of "file with" or "make a report to."

In *United States* v. *Johnson,* 323 U. S. 273, this Court determined that a law should be construed to permit the trial of a defendant in his vicinage if that result can be reached. In the *Johnson* case, the offense involved was an affirmative act, and it was therefore possible to place venue in any state where any part of the affirmative act took place. It is impossible to apply the result of the *Johnson* case literally to the facts of the present case, since here the offense is one of omission rather than commission. The act of shipping the cigarettes is no part of the criminal activity, and the question arises as to whether venue can be fixed on the basis of such shipment. Nor is there any basis for fixing venue at the residence of the defendant or at his place of business. By a process of elimination, the state where the tax official is located is the only location where any part of the crime is sure to occur. The fact that the defendant was not physically present at that place at the time of the offense raises no constitutional problem (*In re Palliser,* 136 U. S. 257; *Burton* v. *United States,* 202 U. S. 344). In effect, the defendant himself fixes the venue for his trial by selecting the state where he aids in the evasion of local tax law. No reasonable alternative to trial in that state is available.

ARGUMENT

Since the Essence of the Offense Here Is the Failure to Make a Required Report, Venue Is Properly Fixed at the Place Where the Report Is Required to be Made.

We start with the proposition that under the Constitution a defendant in the federal courts is entitled to be tried in the state where his offense has been committed. This is provided both by Article III, Section 2, Clause 3, of the Constitution and by the Sixth Amendment, *supra*, p. 3. Though Congress may not disregard this limitation, it still may affect the place of trial by its definition of what constitutes an offense, since the nature of the crime will ordinarily determine where it occurs. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 77. Thus Congress has fixed the situs of mail frauds by defining the crime in the alternative either as depositing matter in a post office or depository for mail or as causing mail to be delivered at its destination (18 U. S. C. 1341). The crime, by definition, occurs either at the place of mailing or at the place of delivering, and venue for the trial of a defendant may be properly fixed at either place. *Salinger* v. *Loisel*, 265 U. S. 224.[2]

---

[2] 18 U.S.C. 3237 provides in part:

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

In the statute here under consideration, Congress has required all persons who ship cigarettes in interstate commerce to persons (other than licensed distributors) in a state taxing the sale or use of cigarettes to forward to the state tax collector a report disclosing the names and addresses of the purchasers and the brand and quantity purchased (15 U. S. C., Supp. V, 376, *supra*, p. 4). Section 3 of the Act (15 U. S. C., Supp. V, 377, *supra*, p. 5) provides that whoever violates the provisions of the Act shall be guilty of a misdemeanor and subject to fine and imprisonment. Thus the criminal conduct involved is the failure to perform a required act.

Venue of an offense of omission, as distinguished from an offense of commission, presents the paradoxical problem of determining the location of not acting. To avoid the logical, but unworkable, answer that a person fails to act everywhere, or nowhere, it has been accepted that venue for an act of omission is fixed in the place where the required act should have been performed (*United States* v. *Lombardo*, 241 U. S. 73; *Rumely* v. *McCarthy*, 250 U. S. 283; *United States* v. *Commerford*, 64 F. 2d 28 (C. A. 2), certiorari denied, 289 U. S. 759; *Bratton* v. *United States*, 73 F. 2d 795 (C. A.10)). The reasoning underlying this rule is expressed in *State* v. *Brewster*, 87 N. J. L. 75, in which a defendant failed to obey the summons of a legislative committee and venue was held to lie at the place

where he had been ordered to appear, rather than the place where he received the summons. The court said, at pp. 76-77:

> The crime does not rest upon the mental conclusion of the defendant that he will not obey, but upon the fact that he does not appear at the place designated * * *

Another court, in dealing with a nonsupport case, stated in *State* v. *Peabody*, 25 R. I. 544, at 545: "[O]ne is answerable for his neglect in the place whre others suffer in consequence."[3]

This brings us, therefore, to the question of where the act of reporting would have been deemed to take place had the defendant complied with the law. The language of Congress is that the report must be "forwarded to" the state tax official (p. 4, *supra*). It should be noted that there is no requirement that the report be forwarded from the state where the shipment of cigarettes originated or from the state of the defendant's residence, or from any other place.

It is commonplace in the conflict of laws sense that when a wrongful act involves more than one state it takes place where the right protected from the wrong is injured. See Beale, *Conflict of Laws*

---

[3] For similar holdings in cases of nonsupport, see *State* v. *Yocum*, 182 Ind. 478, 481; *Johnson* v. *State*, 66 Ill. App. 103, 107-109; *People* v. *Meyer*, 12 Misc. 613, 614 (N.Y. Gen. Sess.); *People* v. *Quigley*, 75 Misc. 151, 156 (County Ct., Monroe County).

(1935), Volume II, page 1287. Thus, if a man shoots across a state line, he kills in the state where the bullet strikes. If he mails a time bomb to a distant city, he commits a crime where the bomb explodes. If he dispatches an agent to assault an enemy in a distant city, he performs a crime where his agent inflicts the blow. See American Law Institute, *Restatement of the Law of Conflict of Laws*, § 428.

In line with this concept, it has been held that the affirmative act of making of a required report is deemed to take place at the place where the official with whom the report is required to be filed is located. (*Eisler* v. *United States*, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958; *Wampler* v. *Snyder*, 66 F. 2d 195 (C. A. D. C.); *United States ex rel. Wampler* v. *Hill*, 74 F. 2d 940 (C. A. 3), certiorari denied, 295 U. S. 732. *Cf. Fuller* v. *United States*, 110 F. 2d 815 (C. A. 9).)

Applying the general rule that the venue for failure to perform a required act is fixed at the place where the act should have been performed, the courts have, in a long line of cases, uniformly held that the failure to make or file a report is also deemed to take place at the office of the official designated to receive the report. An early case along this line is *United States* v. *Lombardo*, 241 U. S. 73, involving the duty to "file with the Commissioner General of Immigration" a statement disclosing the housing of aliens for purposes of pros-

titution. The defendant in the case was indicted in the locality where she maintained her establishment on the theory that it was there that she had failed to forward the report. The Supreme Court held that venue was only in Washington, D. C., where the office of the Commissioner General of Immigration was located, since it was there that the statement was required to be filed. In *Rumely* v. *McCarthy*, 250 U. S. 283, it was held that the failure to report to the Alien Property Custodian under the Trading with the Enemy Act was properly triable in the state and district where the office of the Alien Property Custodian was located. Similarly, with respect to "making" returns to the Commissioner of Internal Revenue under the income tax law (*United States* v. *Commerford*, 64 F. 2d 28 (C. A. 2), certiorari denied, 289 U. S. 759; *Bowles* v. *United States*, 73 F. 2d 772 (C. A. 4), certiorari denied, 294 U. S. 710). The same rule has been applied to the obligation that the railroad "file" a statement of rates with the Interstate Commerce Commissioner. *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267 (C. A. 2). And the same rule was stated in connection with the statute dealing with failure to disclose murder or other felony. *Bratton* v. *United States*, 73 F. 2d 795, 798 (C. A. 10). In short, whatever the language of the statutes, the result has been uniform; the courts have consistently held that the failure to make a report takes

place in the state where the office of the official to whom the report is required to be made is located.

The district court distinguished the statute here involved from those dealing with the making of other reports on the ground that the language, "forward to," connotes starting a report on its way, presumably by placing it in the mail or handing it to a messenger, and thus fixes the place of the act at some place other than the office where the report is to be received. In a way, this is like construing a statute against shooting as meaning "pulling a trigger," rather than "causing a bullet to strike." But even restricting ourselves to the bare language of the statute, the word "forward" has been construed by the courts as referring to the action resulting in the receipt of the object forwarded at the terminal point of transportation rather than merely to starting an object along its way.[4] *Colfax Fruit Co.* v. *So. Pac. Co.*, 118 Cal. 648, 652; *St. L., K. C. & N. Rly. Co.* v. *Piper*, 13 Kan. 505, 510-511; *Christenson* v. *American Express Co.*, 15 Minn. 270, 283; *Davis* v. *Jacksonville Southeastern Line*, 126 Mo. 69, 80. In *Blossom* v. *Griffin*, 13 N. Y. 569, where a carrier relied on the

---

[4] Webster's *New International Dictionary* (2d ed.), at page 995, defines the word "forward" as "to send toward the place of destination; to transmit; as, I shall *forward* the bill of lading this afternoon." At page 2656 of the same dictionary, the word "to" is defined as "Primarily *'to'* express the relation of direction of approach and arrival making its governed word denote the terminus" and at page 2657, "In the direction of and reaching * * *; as, to drive *to* town."

words "to be forwarded," in the receipt given by it for goods, the court held that, upon the facts, the "technical sense" of the words was not to be applied, but that the interpretation would be that the property was "to be carried forward to its destination," the court stating (pp. 574-575):

> * * * [T]here is certainly no necessary meaning of the phrase, "to forward," which excludes the interpretation suggested. There can be no doubt that this was what the parties intended, and I am quite clear that in adopting such a construction, we do no violence to the language in which they expressed themselves.

An argument similar to that adopted by the court below was advanced by a defendant in *United States* v. *Freeman*, 239 U. S. 117, in urging that venue had been improperly placed under a statute making it an offense to "ship or cause to be shipped from one State * * * into any other State" any package of intoxicating liquor without certain labeling. The defendant claimed that venue could not properly be placed in the state to which the package was shipped. This Court rejected this contention, stating at page 120:

> As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a

> common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. *To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance.* * * * [Italics supplied.]

In other statutes, when Congress has intended that the act shall be deemed to occur at the place where the movement commences, it has not lacked for language to express that intent. As one of the alternatives for the venue of mail fraud, it used the language, "whoever * * * places in any post office or authorized depository for mail matter, * * *" (18 U. S. C. 1341). As one of the alternatives for the venue of mailing threatening communications, it provided, "Whoever knowingly deposits in any post office or authorized depository for mail matter * * *" (18 U. S. C. 876), and then went further to provide that the defendant should "be tried in the district in which the matter mailed or otherwise transmitted was first set in motion * * *." (18 U. S. C. 3239). The absence of some such language is perhaps as indicative of Congressional intent as is the use of the words finally adopted.

As stated above, the district court arrived at its conclusion on the ground that the words "forward to" had a different meaning than the words "file" or "make a report." A survey of the legislative history of this provision makes it very clear that Congress intended its language to mean the same as "furnish to," "report to," "supply to," or "file with."

The House Report on the bill states (H. Rep. 416, 81st Cong., 1st sess., pp. 1, 3):

> The purpose of this bill is to assist the States in collecting State-imposed sales and use taxes on cigarettes.
>
> For the purpose of accomplishing this objective the bill provides that any person who sells or otherwise disposes of cigarettes in interstate commerce (where shipment is made to other than a distributor licensed by or located in the State of designation) *must provide the tax administrators* in the State into which the shipment is made necessary data upon which to base assessment and collection of the State cigarette tax. * * *
>
> * * * It would require information *to be furnished* from only those establishments which ship cigarettes to consumers in taxing States from locations outside the State border. * * * The bill merely provides for *making readily available for State use data needed by the States* for the effective administration

and enforcement of their cigarette tax laws. [Italics supplied.]

The Senate Report (S. Rep. 644, 81st Cong., 1st sess., pp. 1, 2) makes a similar opening statement as to the purpose of the bill and a similar statement that the shipper *must provide the tobacco tax administrator* with the specified data. The Report further states:

> It would only require information *to be supplied* by establishments which ship cigarettes across a State border to consumers in States imposing a tax on cigarettes. * * * The bill merely provides for *making readily available to the States, data needed by them* for the effective enforcement of their cigarette tax laws. [Italics supplied.]

Senator George, in charge of the bill, explained its purposes on the floor of the Senate as follows (95 Cong. Rec. 14017):

> Under the bill, shipments made by anyone to a regular dealer in cigarettes, or to anyone authorized to make sales of them, are not to be *reported* [at] all. * * * It is only when he ships to unlicensed and unregistered and undesignated establishments within a State that he must *furnish a copy of the invoice,* or a mere statement, if he wants to, *to the taxing*

> *authority of the State* into which the cigarettes are shipped. * * * [Italics supplied.]

Representative Doughton, in charge of the bill in the House (95 Cong. Rec., p. 6350), stated:

> * * * This bill imposes the duty upon the distributors of cigarettes in those States *to furnish to the tax authorities* of the States affected and to which the cigarettes are shipped information as to the consignee and the number of cigarettes shipped; in other words, information upon which the taxing authorities of a particular State may enforce its own tax laws and collect the taxes that are imposed or levied by the State.[5]

---

[5] And see, for example, the further remarks of the legislators: Mr. Monroney: "* * * The minute they have to *make a return to the State taxing authorities*, you will find that they will be out of business. * * *" (95 Cong. Rec. 6360). Mr. Williams: "* * * information must be *filed* with the Government * * *" (95 Cong. Rec. 14019). And see further use of the phrase "furnish" at 95 Cong. Rec. 6363, 14017, and in a form of resolution adopted by various State legislatures, at 95 Cong. Rec. 1321, 1512, 2215, 2556, 2745, 3148, 3636, and the phrase "report to" at 95 Cong. Rec. 13306, 14015, and "let the State know" at 95 Cong. Rec. 13306. [Italics supplied.]

Even in instances in which the discussion employed the word "send" there appears to be such unvarying tie-up of the word with the destination of the sending as contemplates a duty to get the report *to* the tax administrator. Nowhere do we find a clear, conscious interpretation such as would be properly expressed in a phrase like: "deposit in the mails addressed to the tax administrator." Instead, examples of

The debates in the previous Congress on a similar law, containing the same phrase, "forward to,"[6] likewise support the Government's position and demonstrate that the phrase, from the outset of this legislation, has been considered as imposing a duty to make a report to the tax administrator rather than just a duty to initiate some form of sending. The bill was described as requiring the shipper to "file" (94 Cong. Rec. 6708, 6719), to report to or to make a report (94 Cong. Rec. 6710-6711, 6718, 6720, 6726), give notice to (94 Cong. Rec. 6715, 6718, 6724), make a statement to (94 Cong. Rec. 6719), and "furnish evidence to" (94 Cong. Rec. 6710). Where the phrases deal with sending or mailing, the word "to" appears, joining the sending or mailing with the tax administrator (94 Cong. Rec. 6710-6711, 6715, 6718, 6727, 6729), and in one such paraphrasing the reference to writing to the tax administrator is concluded with the language "when that information is *dis-*

---

the use of the word "send" appear to be coupled with the word "to." See, *e.g.*, Mr. Curtis: "• • • [The Act] merely provides that • • • the seller *must send* a duplicate of the invoice to the taxing authority • • •. [T]hey *must send* a copy of their invoice *to the State taxing authority* • • •. [A] copy of the invoice must be *sent to the State capital to the proper taxing officials* • • •." (95 Cong. Rec. 6355). And see further instances of phrasings of "send to" and "mail to": 95 Cong. Rec. 6353, 6358, 6361-6365, 14017. [Italics supplied.]

[6] See H. R. 5645, 80th Cong., 2d sess., passed only by the House.

closed, that is all he has to do" (94 Cong. Rec. 6719; italics supplied).[7]

Thus the legislative history discloses a congressional intent to impose the same kind of burden on the shippers of cigarettes that was imposed in the "filing" and "reporting" cases cited above. The venue should be the same.

In their briefs in the District Court, appellees relied on *United States* v. *Johnson,* 323 U. S. 273. The heart of this case is that, when possible, statutes should be construed to require the trial of a defendant in his vicinage. The statute in that case forbade the *use* of the mails for the purpose of sending or bringing into a state dentures not constructed in accordance with the law of that state. This Court determined that Congress must have intended that defendants should be tried at the place where they placed the dentures in the mails, in order to avoid the hardships of trying them in a place far from home or in a jurisdiction arbitrarily selected by the Government.[8] Accepting both

---

[7] That the phrase "forward to" is mere common parlance in this Act for *filing* or *furnishing* reports is notably attested by the fact that when the constitutionality of the Act was attacked, in *Consumer Mail Order Ass'n* v. *McGrath,* 94 F. Supp. 705 (D. D. C.), affirmed, 340 U. S. 925, counsel for the shippers of cigarettes repeatedly used such terms as "made reports to" (O. T. 1950, No. 508, Jurisd. Statement, pp. 12-13), "file" (*Ibid.,* pp. 12-13, 18, 26, Pet. for Rehearing, p. 2), and "report to" (*Ibid.,* Jurisd. Statement, pp. 14, 17, 20, 27, 31; Pet. for Rehearing, p. 2).

[8] The venue provision of 18 U.S.C. 3237, referred to in fn. 2, *supra,* according to the reviser's note, was adopted for

the word and spirit of this case, its application to the facts of the present case would give rise to more problems than it would solve.

In the *Johnson* case, the criminal activity involved was an act of commission, the violation being the act of using the mails to send objects which Congress had declared should not be sent. In that case, therefore, there was a physical act of commission at the point where the dentures were placed in the mails and as a result it was entirely possible for Congress to fix that locality as the situs of the crime. Here, on the other hand, the act is one of omission and there is no geographic place from which Congress stated, or implied, that the report should be mailed. Since no report was mailed, there was no act of commission to which to tie venue.

In order to avoid this difficulty, the district court fixed the situs of the crime at the point where the

---

the specific purpose of meeting the situation created by the decision of this Court in the *Johnson* case. The Reviser's note reads:

> The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in United States v. Johnson, 1944, 65 S. Ct. 249, 89 L. Ed. 236, which turned on the absence of a special venue provision in the Dentures Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in section 1073 of this revision.

cigarettes themselves were placed in the mails. The difficulty with this disposition of the case is that at the time of the shipment of the cigarettes, no offense was committed; the interstate shipment merely constituted a condition precedent to the requirement that a report be forwarded to the state official within the first ten days of the succeeding month. If the Government chose to prosecute in the state from which the cigarettes were shipped on the theory that the failure to report should be related back to the time and place of shipment, it would doubtless be met with the defense that there was no duty to report to the state tobacco tax administrator at the time of shipment or from that district. A similar theory of venue was rejected in *United States* v. *Midstate Horticultural Co.*, 306 U. S. 161. In that case, interstate transportation under the Elkins Act was legal at the time it transpired, just as was the shipment of cigarettes here. Several years later, an illegal rebate was obtained and prosecution was then undertaken at the place of transportation. The Court stated, at page 166:

> *We do not believe Congress intended that subsequent conduct or events should stamp criminality upon an act that was lawful, and wholly unrelated to any unlawful plan or purpose, when done.* Here, the full lawful rate was paid for the transportation involved. The lawful transportation through the Eastern

> District of Pennsylvania was not infected by relation to any unlawful agreement, purpose or intent at the time it occurred. The record shows no offense that began in 1932 and continued until 1935. * * * [Italics added.]

The failure to make the required report within the first ten days of the following month no more made anything done in the place from which the cigarettes were shipped illegal than the subsequent rebates made illegal anything done in the district of prior transportation.

Moreover, the place from which the cigarettes are shipped is not necessarily a place where the constitutional purpose of protecting the defendant will be achieved. In case No. 198, for example, the defendant, Purchasing Corporation of America, is a Virginia corporation with offices in Alexandria (198R.1). The cigarettes actually were shipped from North Carolina and West Virginia (198R.2), so that even if the venue suggested by the district court were adopted, the corporation would not be tried in its home state.

To establish venue at defendant's residence would also subject the indictment to attack, since no part of the crime, as defined, takes place there. There is similar difficulty in placing the situs of the offense at the defendant's place of business, since the statutory prohibition is not aimed at a continuing course of conduct but rather at a particular failure to file a report. Thus, in No. 198,

it is difficult to say that the omission occurred in Virginia, North Carolina, or West Virginia. By the process of elimination, it appears that the only location where a part of the crime is sure to occur is in the state where the report is to be received.

The fact that the defendant was not present in that state is not an objection to fixing venue there. It has long been held that the personal presence of a defendant in the state at the time the offense occurred is not a constitutional prerequisite to venue (*In re Palliser,* 136 U. S. 257, 265-268; *Horner* v. *United States, No. 1,* 143 U. S. 207, 213; *Burton* v. *United States,* 202 U. S. 344, 387; *Salinger* v. *Loisel,* 265 U. S. 224, 235; *McBoyle* v. *United States,* 43 F. 2d 273 (C. A. 10), reversed on other grounds, 283 U. S. 25). Nor does it appear that the Court should strive to avoid such a result in these cases. Here the seller of cigarettes is able to do business only because buyers can evade the state tax by buying the cigarettes in unmarked packages shipped in from outside by him (See S. Rep. 644, 81st Cong., 1st sess., pp. 1-2; H. Rep. 416, 81st Cong., 1st sess., pp. 1-2; 94 Cong. Rec. 6727). By shipping the cigarettes to a particular state, the seller in reality selects the locality where he is required to send the report. If he desires to be tried close to home, he will do well to limit his shipments of cigarettes to nearby states. Or he can arrange to be tried in the state where he resides by limiting his activities to aiding in the evasion of his own state's taxes only.

Since it is impossible to make a literal application of the principles of *United States* v. *Johnson* to the circumstances of the present case, the fixing of venue at the place where the report is required to be made appears to be the only reasonable alternative.

CONCLUSION

For the reasons stated above, it is submitted that the judgments dismissing the indictments should be reversed.

ROBERT L. STERN,
Acting Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

NOVEMBER 1952.

U.S. GOVERNMENT PRINTING OFFICE 1952—230457/P.C.050

Office - Supreme Court, U.S.
FILED
DEC 24 1952

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 197

THE UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH H. WILSON, doing business under the trade name and style of "Cooperative Buying Service", *Appellee*.

NO. 198

THE UNITED STATES OF AMERICA, *Appellant*,

v.

PURCHASING CORPORATION OF AMERICA, NORMAN W. RAIES, WILLIAM T. TWEEL, and MARY LOUISE HADDAD,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE APPELLEES

STANDARD PTG. & PUB. CO., LAW PRINTERS, HUNTINGTON, W. VA.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional Provisions and Statute Involved	2
Statement	4
Summary of argument	5
Argument:	
I. The Constitution guarantees that an accused shall be tried in the State and District in which a Federal crime is committed	6
II. The words of the Jenkins Act which constitute the alleged offense are clear and unambiguous and must be given their usual and ordinary meaning. If this is done, the alleged offense could not have occurred within the Eastern District of Louisiana	7
III. This Court and lesser courts have recognized that the word "forward" does not imply delivery and is not equivalent in meaning to the word "file".	11
IV. Although the language of the Jenkins Act is clear and unambiguous, and therefore legislative history should not be resorted to for purposes of construction, nevertheless such history supports the proposition that venue does not lie in the Eastern District of Louisiana	16
V. If there is doubt as to venue, prosecution should be had in the district most accessible to the defendant.	22
Conclusion	24

CITATIONS

Page

Cases:

Bowles v. United States, 73 F 2d 772 13
Browder v. United States, 312 U. S. 335 10
Colfax Fruit Co. v. Southern Pacific Co., 118 Cal. 648 15
Eisler v. United States, 176 F 2d 21 14
Katcher v. American Express Co., 94 N. J. L. 165 13
New York Central and H. R. R. Co. v. United States, 166 F. 267 14
Nicoletti v. Bank of Los Banos, 190 Cal. 637 12
Prussian v. United States, 282 U. S. 675 11
Rumely v. McCarthy, 250 U. S. 283 ..... 7, 14
Taft v. Commissioner of Internal Revenue, 304 U. S. 351 10
United States v. Alpers, 338 U. S. 680 10
United States v. Commerford, 64 F 2d 28 13
United States v. Freeman, 239 U. S. 117 14
United States v. Harris, 177 U. S. 305 10
United States v. Johnson, 323 U. S. 273 ..... 5, 6, 23
United States v. Lombardo, 241 U. S. 73 ....5, 7, 10, 11
United States v. Resnick, 299 U. S. 207 ..... 10, 11
United States v. Van Den Berg, 139 F 2d 654 7
United States v. Wiltberger, 5 Wheat. 76 10
Viereck v. United States, 318 U. S. 236 10
Wampler v. Snyder, 66 F 2d 195 13
Wilbur v. United States, 284 U. S. 231 10

Constitutional Provisions and United States Statutes:

Constitution:
Art. 3, Sec. 2, Clause 3 ..... 2, 6
Sixth Amendment 2, 6
Criminal Appeals Act 18 USC 3731 2
Public Law 363, 81st Cong., 1st sess., 63 Stat. 884, 15 USC 375, et seq. 2, 3, 7

Page

Miscellaneous:

Webster's New International Dictionary, 2d ed (1953), p. 995 7
Hearings before the Committee on Ways and Means, on H. R. 195, 81st Cong., 1st sess., March 28, 29, and 31, 1949, p. 110 ..... 16, 20
H. Rep. 416, 81st Cong., 1st sess., p. 3 17
S. Rep. 644, 81st Cong., 1st sess., p. 2 17
95 Cong. Rec. 6362 18
95 Cong. Rec. 6364 18-19
95 Cong. Rec. 6361 19
95 Cong. Rec. 14017 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 197

THE UNITED STATES OF AMERICA, *Appellant*,

v.

JOSEPH H. WILSON, doing business under the trade name and style of "Cooperative Buying Service", *Appellee.*

NO. 198

THE UNITED STATES OF AMERICA, *Appellant*,

v.

PURCHASING CORPORATION OF AMERICA, NORMAN W. RAIES, WILLIAM T. TWEEL, and MARY LOUISE HADDAD,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the District Court is not yet reported, but a copy is in the records (197 R. 6-7; 198 R. 4-6).

JURISDICTION

The appeals in these cases were taken by the United States under the Criminal Appeals Act, 18 USC 3731, the dismissals in the District Court having been based upon the construction of the Federal statute upon which the indictments were founded.

QUESTION PRESENTED

The Jenkins Act, 15 USC 375, et seq. requires a person who ships cigarettes from one state to anyone other than a licensed distributor in another state *to forward* to the tobacco tax administrator of the state into which such shipment is made, within ten days after the end of the month in which the shipment was made, a memorandum or copy of the invoice covering such shipment. The Act makes the failure *to forward* such information a misdemeanor. The question presented is whether the venue of the offense of failing *to forward* the memorandum or invoice lies in the district where such tobacco tax administrator is located.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article 3, Section 2, Clause 3, of the Constitution provides:

> "The Trial of all Crimes, * * * shall be held in the State where the said Crimes shall have been committed; * * * ."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * ."

Public Law 363, 81st Cong., 1st sess., 63 Stat. 884, 15 USC 375, *et seq.*, commonly known as the Jenkins Act, provides as follows:

"To assist States in collecting sales and use taxes on cigarettes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act the term—

(a) 'person' means any individual, partnership, corporation, or association;

(b) 'disposing of' means any transfer for profit;

(c) 'cigarette' means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco;

(d) 'licensed distributor' means any person authorized by State statute or regulation to distribute cigarettes at wholesale or retail;

(e) 'use', in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes;

(f) 'tobacco tax administrator' means the State official duly authorized to administer the cigarette tax law of a State.

SEC. 2. Any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes shall, not later than the 10th day of each month, forward to the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every such shipment of cigarettes made during the previous calendar month into said State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

SEC. 3. Whoever violates the provisions of this Act shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than six months, or both."

STATEMENT

Appellant's statement (App. Brief 5-6) is accurate except that it fails to state that the indictments charged that appellees failed to forward the memoranda or copies of invoices *within the ten day period* prescribed by the Jenkins Act, and except that in the last sentence it improperly uses the word "reports" in place of the words "memoranda or copies of invoices."

SUMMARY OF ARGUMENT

The Constitution guarantees that an accused shall be tried in the state and district in which a crime is committed.

Here the crime is an omission, i. e., the failure *to forward* to a state official memoranda or copies of invoices of certain interstate shipments by persons without the State of Louisiana to persons within that State.

The usual and ordinary meaning of the word "forward" or the words "forward to" is to start the memoranda or copies of invoices on their journey to the state official. Implicit in such words is the proposition that some time will elapse between the forwarding and the receiving, and also that some intervening distance must be covered between the forwarding and the receiving. The word "forward" does not mean file or include a duty to file, and does not comprehend delivery.

All reasons of policy require the same meaning. (*United States v. Johnson*, 323 U. S. 273.)

The legislative history confirms this meaning.

This Court has recognized the difference in the meaning of the word "forward" and the word "file". (*United States v. Lombardo*, 241 U. S. 73.)

The failure "to forward" did not take place in the Eastern District of Louisiana and therefore venue does not lie there.

ARGUMENT

I.

The Constitution guarantees that an accused shall be tried in the state and district in which a federal crime is committed.

Appellees contend that the District Court for the Eastern District of Louisiana is without jurisdiction of the offenses charged in the indictments, because the alleged offenses were not committed within that district.

Realizing the many hardships, excesses, and prejudices to which an accused might be subjected by allowing him to be tried in a jurisdiction foreign to his environment or the locus of the crime, the framers of the Constitution provided, in Article 3, Section 2, Clause 3, of the Constitution:

> "The trial of all crimes, * * * shall be held in the State where the said Crimes shall have been committed; * * * "

So fundamental and important is this Constitutional safeguard that it was reemphasized in the Sixth Amendment, and again by this Court in Rule 18, Federal Rules of Criminal Procedure.

There can be no doubt, therefore, that an accused has the absolute Constitutional right to be tried within the State and district in which the alleged offense was committed. See *United States v. Johnson*, 323 U. S. 273.

II.

The words of the Jenkins Act which constitute the alleged offense are clear and unambiguous and must be given their usual and ordinary meaning. If this is done, the alleged offense could not have occurred within the Eastern District of Louisiana.

Section 2 of the Jenkins Act (15 USC 375), insofar as here pertinent, provides that a person selling or disposing of cigarettes in interstate commerce " * * shall * * forward * * to the tobacco tax administrator of the State into which such shipment is made * * " certain memoranda or copies of invoices, and Section 3 makes a violation of the Act a misdemeanor.

The Jenkins Act thus requires the shipper of cigarettes in interstate commerce *to forward* certain memoranda or copies of invoices, and makes the *failure to forward* a crime. It is well settled that where an omission to act constitutes a crime the venue of such crime is the jurisdictional locality where the act should have been performed. *United States v. Lombardo*, 241 U. S. 73; *Rumely v. McCarthy*, 250 U. S. 283; *United States v. Van Den Berg*, 139 F 2d 654, 656 (C. A. 7). Therefore our sole inquiry is — Did the alleged failure *to forward* occur within the Eastern District of Louisiana?

Since Congress in enacting the Jenkins Act did not define the word "forward" and did not make provision for the venue of the offense comprehended, the problem is one of construction.

Webster's New International Dictionary, 2d ed. (1953), p. 995, defines the word "forward", insofar as pertinent, as:

> "To send forward; to send toward the place of destination; to transmit; as, I shall *forward* the bill of lading this afternoon; I wrote the letter but have not *forwarded* it."

It is obvious that under the above definition the word "forward" does not imply delivery, but merely connotes the setting of an object in motion from the place of the sender. It is difficult to express this idea better than did the District Court when it said: "As I have indicated previously, to my mind implicit in the word 'forwarding' or the word 'forward' is the proposition that some time will elapse between the forwarding and the receiving and also some distance must be covered, intervening distance, between the forwarding and the receiving." (197 R. 6; 198 R. 5).

Appellant in its brief has undertaken to distinguish the meaning of the word "forward," which apparently is conceded, and the meaning of the phrase "forward to", contending that the phrase "forward to" means that the information must reach the person to whom it is forwarded. This distinction is at odds with the clear, plain, and unambiguous meaning of such phrase.

There is no material distinction between the meaning of the word "forward" and the phrase "forward to." By definition and by custom and usage, the ordinary meaning of the phrase "forward to" does not imply or ascribe any act of the sender or forwarder other than the act of putting an object in motion. In the cases at bar the clear and unambiguous meaning of the phrase "forward to" is unmistakably equivalent to the meaning of the word "forward,"

namely the sending or transmitting by mail or other appropriate agency of certain memoranda or invoices properly addressed. The word "to" after the word "forward" does no more than indicate the person to whom the memoranda or invoices are to be sent.

If the word "forward" and the phrase "forward to" are given their clear and unambiguous meaning, it is obvious that the omission, if any, occurred outside of the Eastern District of Louisiana.

By way of illustration, assume that appellee Wilson should go to trial and offer conclusive proof that the information required by the Jenkins Act had been forwarded by him to the tobacco tax administrator of Louisiana within the prescribed time by depositing such information in the United States mail at Murphy, North Carolina, with proper postage attached and properly addressed. It is respectfully submitted that whether or not the tobacco tax administrator received the information thus forwarded would be immaterial, Wilson having done all that the Act required him to do. The Act does not require a return to be filed or a report to be made to the tobacco tax administrator. It requires only the forwarding of the information to such official. If this be true, then clearly the locus of the alleged offense is not within the Eastern District of Louisiana.

The purpose of statutory construction is to effectuate the legislative intent, and the most persuasive evidence of such intent is the words actually employed by the legislature. Where, as in the cases at bar, the words are clear and unambiguous and sufficient in and of themselves to determine the purpose of the leg-

islation, this Court has followed the plain meaning of such words. *Wilbur v. United States*, 284 U. S. 231, 237; *Browder v. United States*, 312 U. S. 335, 338; *Taft v. Commissioner of Internal Revenue*, 304 U. S. 351, 359. Nowhere is this canon of construction more applicable and required than in the construction of penal statutes. *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Resnick*, 299 U. S. 207; *United States v. Alpers*, 338 U. S. 680, 684. This Court observed in *Viereck v. United States*, 318 U. S. 236, 243—

> "The unambiguous words of a statute which impose criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

Chief Justice Marshall said in the *Wiltberger* case (pp. 94-95)—

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

To this same effect see *United States v. Lombardo*, 241 U. S. 73.

Other principles of statutory construction which are pertinent to the cases at bar are that penal statutes are to be strictly construed. *United States v. Harris*,

177 U. S. 305; *Prussian v. United States*, 282 U. S. 675, 677; *United States v. Resnick*, 299 U. S. 207. And that all reasonable doubts concerning their meaning should be resolved in favor of the accused. *United States v. Resnick*, supra.

Accordingly, it is respectfully submitted that the plain and unambiguous meaning of the word "forward" and the phrase "forward to" is the best and most persuasive evidence of the intent of Congress as to the venue of the offense comprehended by the Act, and if such word and such phrase are given their plain and unambiguous meaning, the alleged offense could not have been committed within the Eastern District of Louisiana.

III.

This Court and lesser courts have recognized that the word "forward" does not imply delivery and is not equivalent in meaning to the word "file".

Judicial determination of the meaning of the word "forward" is consistent with the decision of the District Court. In *United States v. Lombardo*, 241 U. S. 73, the defendant resided in the Western District of Washington and was indicted in that district for failure "to file" with the Commissioner General of Immigration a statement required by the White Slave Law to the effect that the defendant, as the owner of a house of prostitution, kept or procured an alien woman for purposes of prostitution. The language used in the statute was that such person " * * shall file with the Commissioner General of Immigration a statement in writing * * * . " The defendant de-

murred to the indictment on the ground that the District Court had no jurisdiction, as the crime, if any, had been committed within the District of Columbia, wherein the office of the Commissioner General of Immigration was located. The District Court sustained the defendant's demurrer. On appeal to this Court the United States contended that the indictment in the Western District of Washington was proper because "forwarding through the usual course of mail should be considered as filing," and the failure to forward had occurred within the Western District of Washington. This Court affirmed the decision of the District Court, holding that the offense, an omission, was failing to file, not failing to forward, and that the act of filing was accomplished when the document was delivered to and received by the Commissioner. This Court thus expressly recognized that the word "forwarding" is used in contradistinction to the word "filing."

It is curious indeed that the appellant, on a former occasion having had its contention to the effect that the word "file" is equivalent to the word "forward" rejected by this Court, now in the cases at bar contends the converse, namely that the word "forward" is equivalent to the word "file". If black is not white, certainly white is not black.

Analogous to the cases at bar are various decisions of lesser courts involving the construction of contracts in which banks and express companies agreed to "remit", "transmit", and "forward". Two examples will be mentioned.

In *Nicoletti v. Bank of Los Banos*, 190 Cal. 637, the California Supreme Court held that a bank, under

an agreement to "remit" money to a person residing in a foreign country, was not liable for the delivery of such money to the person designated, but was only liable to transmit the same through ordinary banking channels. In rendering its opinion the Court quoted with approval language to the effect that the word "remit" was synonymous with the word "forward". Both words mean to send; they do not mean to deliver.

In *Katcher v. American Express Co.*, 94 N.J.L. 165, the Court of Appeals of New Jersey in construing the liability of an express company under a written receipt providing for remittance of currency to an individual residing in a foreign country commented that the word "remit" and the word "forward" were used synonymously, and held that the duty to remit did not mean or imply the duty to deliver.

Appellant in its brief, disregarding the actual words of the statute here involved, has at least inferred that all offenses which relate to sending information through the mail or other agency occur at the place where the information is to be received. In this connection it should be noted that the Jenkins Act does not require a report to be made or a return to be filed, nor does it use any similar language.

The cases cited by appellant in support of this inference involve statutory language far different from that employed in the Jenkins Act. For example, such cases cited by appellant as *Wampler v. Snyder*, 66 F 2d 195 (C.A.D.C.), *United States v. Commerford*, 64 F 2d 28 (C.A. 2), and *Bowles v. United States*, 73 F 2d 772 (C.A. 4), consider questions of venue under the Revenue Act of 1928. The statute involved provided—"Returns shall be made to the collector * * * ".

Obviously these cases are unlike the cases at bar. The language of the Revenue Act requiring the making of a return is certainly not equivalent to the act of forwarding. In *Eisler v. United States*, 176 F 2d 21 (C.A.D.C.), Eisler was indicted for making a false statement in an application which he filed with the Secretary of State. The venue was laid in the District of Columbia, where the application was filed, and the court of course held such venue to be proper. In *Rumely v. McCarthy*, 250 U. S. 283, the defendant was charged with violating the Trading with the Enemy Act, which imposed the duty to "report the fact" of having property of an enemy to the Alien Property Custodian. Clearly the duty to report the fact is not equivalent to the duty "to forward". In *New York Central & H. R. R. Co. v. United States*, 166 Fed. 267 (C.A. 2), the Court considered the question of venue under the Interstate Commerce Act, which provided that common carriers subject to the Act shall make certain schedules of rates and " * * shall file with the commission hereinafter provided for, copies of schedules of rates * * . " The Court held that such filing could only take place in the District of Columbia, where the commission had its office; therefore the omission — i. e., the failure to file — could only occur there. How different from the cases at bar.

The argument as to venue advanced by defendant in *United States v. Freeman*, 239 U. S. 117, is not, as stated by appellant, similar to the argument adopted by the court below, and the case is neither in point nor analogous. The *Freeman* case involved a statute making it unlawful to "ship or cause to be shipped from one state, * * into another state * * " packages of liquor. This Court held that the offense

consisted of two different parts — namely, to ship from a state, and to ship into another state — and that such parts constituted a continuing act. In the cases at bar there is no suggestion by appellant that the "failure to forward" is a continuing offense, and the offense in the cases at bar is not susceptible of such a construction. Accordingly the *Freeman* case has no application here. Furthermore, the decision of this Court in the *Freeman* case would support, by inference at least, appellees' contention as to the jurisdictional locus of the word "forward". This Court in its decision there was required to rely on the theory of a continuing offense in order to conclude that jurisdiction lay in the district where the package of liquor was delivered. It would thus appear that unless such words as "forward", "transmit", "send", and "ship", when used in a criminal statute clearly comprehend an affirmative *continuous* act, the usual and technical meaning of such words, which does not connote delivery, will be observed.

All other cases cited by appellant which involve statutory construction are equally wide of the mark.

The collection of cases on page 14 of appellant's brief, beginning with *Colfax Fruit Co. v. Southern Pacific Co.*, 118 Cal. 648, involve contracts made by common carriers for the transportation of goods. A careful reading of these cases discloses that in each case the defendant common carrier had by unilateral contract or receipt attempted to limit its liability by describing itself as a mere "forwarder" or by agreeing merely to "forward" the goods. The *ratio decidendi* of these cases, in some frankly admitted and in others implicit, was that a common carrier could not limit its liability as a common carrier by resorting to con-

tractual language which did not accurately represent the true relationship between the shipper and the carrier.

The non-support cases mentioned by appellant on page 11 of its brief do not by any stretch of the imagination have any bearing on the question here involved.

IV.

Although the language of the Jenkins Act is clear and unambiguous, and therefore legislative history should not be resorted to for purposes of construction, nevertheless such history supports the proposition that venue does not lie in the Eastern District of Louisiana.

Appellant in its brief has quoted certain passages from the legislative history of the Jenkins Act in an effort to support its contention that the Act imposes upon the shipper the duty of filing the memoranda or invoices, but has omitted many other passages which contradict its contention.

As previously submitted, the cases at bar involve a statute which is clear and unambiguous as to the prescribed duty, and therefore the words of the statute are the most persuasive evidence of the intent of Congress. If, however, resort is had to the entire legislative history of the Jenkins Act, it is quite obvious that Congress intended that a shipper would be required only to forward (not file or deliver) the memoranda or invoices, and if he failed to do so he should be tried " * * in the district where he was located—." (Hearings before the Committee on Ways and Means, on H. R. 195, 81st Cong., 1st sess., March 28, 29, and 31, 1949, page 110).

Most significant is the "Analysis of the Bill" contained in the House Report on the Bill (H. Rep. 416, 81st Cong., 1st sess., p. 3), which provides in part:

> "Section 2: This section requires any person selling or disposing of cigarettes in interstate commerce, where shipment is made to other than a distributor licensed by or located in the taxing State, *to forward* to the State tax administrator thereof a memorandum or copy of the invoice of the shipment showing the name and address of the person to whom the shipment is made, the brand and quantity. Such memoranda or copies *are to be forwarded* not later than the tenth day of the month following the month of shipment." (Emphasis supplied).

The Senate Report (S. Rep. 644, 81st Cong., 1st sess., p. 2) makes a similar "Analysis of the Bill":

> "Section 2 requires any person selling or disposing of cigarettes in interstate commerce, where shipment is made to other than a distributor licensed by or located in the taxing State, *to forward* to the State tobacco tax administrator thereof a memorandum, or copy of the invoice of the shipment, showing the name and address of the person to whom the shipment is made, the brand and quantity. Such memoranda or copies *are to be forwarded* not later than the tenth day of the month following the month of shipment." (Emphasis supplied).

If, as appellant contends, the Congressional purpose was to require filing or delivery of the memoranda or copies of the invoices, why did both reports in analyzing H. R. 195 employ the phrases "to for-

ward" and "are to be forwarded" in their interpretative analysis of the bill rather than the phrases "to file with" and "are to be filed"? Obviously if the Committees had believed or intended that the word "forward" was equivalent to the words "file" or "deliver", they would have made such equivalence known in their interpretative analyses.

During the debate on H. R. 195 in the House of Representatives, Representative Burnside asked —

> "I would like to ask the gentleman: Suppose a person from the State of Ohio should write to one of these companies and ask them to ship cigarettes to him."

Representative Jenkins, the author of H. R. 195, replied—

> "All right. If he does that, whoever employs the mails or an instrumentality of interstate commerce to ship cigarettes into the State of Ohio without having made arrangements to stamp them must send notice to the Ohio tax authorities. That is all he would have to do." (95 Cong. Rec. 6362).

Appellees agree with the statement of the author of the bill — A shipper is required merely *to send* a notice. That is all he is required to do.

In the same debate in the House of Representatives Representative Cooper, a member of the Committee on Ways and Means, stated—

> "The only duty or obligation imposed upon anybody under this bill who ships cigarettes into a State where a State tax is

imposed is simply to *forward* to the taxing authority of that State a copy of the invoice or a simple memorandum; in other words, if somebody in the great State of Missouri, where they do not have a State cigarette tax, wishes to send a shipment of cigarettes to my State of Tennessee, he simply *mails* to the commissioner of finance and taxation of the State of Tennessee, a copy of the invoice or a simple memorandum that he shipped those cigarettes and he is free; *no other duty or obligations are imposed upon him.*" (95 Cong. Rec. 6364). (Emphasis supplied).

Representative Jennings, an ardent supporter of H. R. 195, in this same debate stated—

> "This proposed law simply says to the fellow who wishes to ship cigarettes from one State to another to an unlicensed dealer in cigarettes that when he makes the shipment he shall *mail* a duplicate invoice to the State taxing authority." (95 Cong. Rec. 6361). (Emphasis supplied).

Senator George, Chairman of the Committee on Finance, during the debate on H. R. 195 in the Senate, commented as follows:

> "But, of course, the violation lies in the fact that during January, for instance, he failed or refused by the tenth of February to *send* a copy of his invoice to the State taxing authority." (95 Cong. Rec. 14017). (Emphasis supplied).

The only passage contained in the entire legislative history with specific regard to the venue of the offense created by the Jenkins Act was not men-

tioned in appellant's brief. In the hearings on H. R. 195 conducted by the Ways and Means Committee the following colloquy occurred between Representative Doughton, Chairman of the Committee, and C. Emory Glander, Tax Commissioner of Ohio and a lawyer, one of the most active and vocal proponents of the bill:

> "Mr. Glander. You are talking about the consignee? The consignee never becomes a violator. It is only the shipper who might become the violator of the Federal law.
>
> "The Chairman. Where would you try him; at his home?
>
> "Mr. Glander. We would try him, I think, *in the district where he was located*—would be my guess.
>
> "Mr. Jenkins. That is all."
>
> (Hearings before the Committee on Ways and Means on H. R. 195, 81st Cong., 1st sess., March 28, 29, and 31, 1949, page 110). (Emphasis supplied).

The above quoted colloquy is important. It reveals that the proponents of the bill apparently did not believe that the shipper could be tried in the district where the tobacco tax administrator resided, but should be tried where the shipper was located. Mr. Glander so stated, and Mr. Jenkins by his silence obviously approved of Mr. Glander's statement. It discloses that the Committee on Ways and Means was apprised of the problem of venue. It is therefore quite improper to suggest that the Committee would have

intended or approved a venue which could only be supported by a strained and unreasonable construction of the Act.

Certainly Congress, in enacting the Jenkins Act, and especially the Committees to which it was referred, were aware of the fundamental difference between the word "forward" and the word "file" as pronounced by the courts. If Congress had desired to establish venue within the State to which the cigarettes were shipped, it would have required the shipper to "file" the information with the State official. Since Congress did not do so, but merely required the shipper to "forward" the information, the Congressional intent clearly appears to have been to fix the venue at the place of shipment. Moreover, there are at least two reasons, both founded in right and justice, for what Congress did.

It is certainly unfair, and could be very oppressive, to permit a shipper of cigarettes to be indicted in innumerable States at the same time for violations of this Act, especially since the offense is merely *malum prohibitum* and not *malum per se*, and is only a misdemeanor. Let us assume, by way of illustration, that appellant Wilson is indicted in such widely separated places as Florida, California, Maine, Louisiana, North Dakota, and Arizona—or even in forty-seven different states. An harrassment of this kind by the Department of Justice might easily cause his financial ruin, regardless of how innocent he might be of any violation of the Jenkins Act. He might be conducting his business in such manner that the Jenkins Act would not be applicable. He might be acquitted in each of the forty-seven states. But he might nevertheless be forced into bankruptcy.

Appellant contends that the Jenkins Act requires the data *to be filed*. Under this construction the data would have to be in the hands of the official within ten days from the last day of each month for all shipments during the preceding month. Often compliance could not be made within that time. Certainly some time must elapse after the end of the month before Wilson would be in a position to mail the data. And then he would not be sure either that it had been received by the official in time or that it had been received at all. It is not too much of an exaggeration to say that if appellant's contention is followed Wilson to be entirely safe from prosecution would have to employ forty-seven different messengers, assuming that he ships to all states except his own, to carry the data and file it with the various tobacco tax administrators.

No doubt Congress had these things in mind when it limited the duty of the shipper to that of forwarding the data — that is, starting it on its journey — within ten days from the end of the month.

V.

If there is doubt as to venue, prosecution should be had in the district most accessible to the defendant.

If there is doubt as to the proper venue for an offense under the Jenkins Act, appellees should be afforded an opportunity to defend themselves in the district from which the cigarettes were shipped, and if this requires a strict construction of the word "forward," it is respectfully submitted that this Court should adopt such construction.

This Court said in *United States v. Johnson*, 323 U. S. 273;

> "The large policy back of the constitutional safeguards counsels against the unrestricted construction for which the Government contends when Congress has not commanded it; and no considerations of expediency require it. * * * While it might facilitate the government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the government's witnesses to trial at tne place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise, * * * of marshaling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction, the judgment below should be affirmed."

This Court in the same opinion further stated—

> "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Certainly if prosecution is had in Louisiana, appellees will be put to great expense, trouble, and difficulty in marshaling witnesses, employing local counsel, and in other ways, in defending themselves. Even if they are completely innocent, and are so found by the District Court, they will still be heavily penalized by being dragged to a distant jurisdiction to answer for a misdemeanor. More important, perhaps, is the fact that such trials will be before distant juries unacquainted with the character and reputation of the appellees.

Therefore, it is submitted that in the interest of justice, venue of the alleged offenses should be determined to lie in the district from which the cigarettes were shipped, that being the place where appellees necessarily keep the records and information upon which the required memoranda are based, where appellees maintain an office and are doing business and where appellees' witnesses are available.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments dismissing the indictments should be affirmed.

SELDEN S. McNEER,
ROBERT K. EMERSON,
HOBART L. McKEEVER,
CAMPBELL, McNEER & WOODS
Attorneys for Appellees.